No. 22470

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GRANT CONSTRUCTION COMPANY,

Appellant,

vs.

UNDERWRITERS AT LLOYD'S OF LONDON & NORTHWEST UNDERWRITERS,

Appellee.

BRIEF OF APPELLANT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO NORTHERN DIVISION

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STATEMENT OF PLEADINGS AND JURISDICTION

This is a civil action by Grant Construction Company, plaintiff-appellant, to recover from Underwriter's at Lloyd's London and Northwest Underwriters, defendants-appellees, the sum of $100,000.00 under the provisions of a policy of personal accident insurance issued by said defendants, together with attorney's fee and costs. The insured, now deceased, was Joseph W. Grant and plaintiff-appellant, Grant Construction Company, is the named beneficiary under the policy.

This action was commenced in the United States District Court for the District of Idaho, Northern Division, by complaint filed February 10, 1965. (R.5) The defendants appeared in the action by filing an answer. (R.17)

An agreed stipulation of facts was filed. (R.22) The cause was tried by the Court sitting without a jury and a judgment in favor of defendant was entered August 30, 1967. (R.60)

The jurisdiction of the District Court was invoked pursuant to the provisions of Title 28, United States Code Annotated, Sec. 1332.

The jurisdiction of this Court to review this case arises under Title 28, United States Code Annotated, Secs. 1291-1294, this being a final decision and judgment of a District Court from which an appeal may be taken.

STATEMENT OF THE CASE

Prior to the trial of this action, the parties, through their respective attorneys of record, entered into a written stipulation regarding some of the facts (R.22) involved in the case. The stipulated facts are:

Northwest Underwriters, acting for and on behalf of Lloyd's of London, through McGovern-Carroll Company, agency of Spokane, Washington, did, on the 10th day of May, 1962, for a premium paid, insure Joseph W. Grant under Certificate of Insurance LNWT No. 102798 for the sum of $100,000.00 against accidental bodily injury, according to the terms and conditions of that policy; with Grant Construction Company as beneficiary.

Joseph W. Grant died on the 18th day of June, 1962.

The autopsy finding of Dr. Alberto M. Barrera, the local coroner, were as follows:

> "Autopsy findings in this case of the late Mr. Joseph William Grant, 65 year old adult male. Time of the death about 2:30 P.M., June 18, 1962. Death was due to acute coronary obstruction by infarctus of the right descending branch of the coronary artery of the heart. Death was more or less instantaneuous.
> "Signed at Kaslo, B.C., June 19, 1962."

In addition to the foregoing stipulated facts the evidence established that on the day of his death, Joseph W. Grant and his wife were fishing on Kootenai Lake, British Columbia, Dominion of Canada, in a sixteen-foot fiberglass boat. The boat was powered by a 45 horsepower Mercury motor with a 10 horsepower auxiliary motor. The weight of the boat and motors was 1500 pounds. Mrs. Grant weighed 125 pounds.

While they were fishing a sudden storm condition developed with high winds and rough water which caused them to fear that their boat might capsize. Neither the deceased nor his wife could swim. Deceased became emotionally upset, nervous and distressed and he undertook to beach the boat. The shoreline was extremely jagged and steep. Mr. Grant drove the boat as near to the shoreline as water depth permitted and then crawled out of the boat into the water and with a rope tugged and pulled on the boat in an attempt to lodge it onto the shoreline.

Considerable time was spent by deceased, both in and out of the cold water, in an attempt to lodge and secure the boat against the storm. The action of the water and the winds was such as to cause the boat to be thrown against the rocks located along the shoreline threatening to destroy the boat.

After repeated strenuous efforts and much exertion in attempting to lodge and secure the boat he became very pale and appeared to

be gasping for breath. Upon reaching the boat he slumped into the boat in an unconscious condition and he died very shortly thereafter. His body was returned to Kaslo, British Columbia where an autopsy was performed, the results of which are stated in the foregoing stipulated facts.

SPECIFICATIONS OF ERROR

(1) The Court erred in its interpretation and construction of the insurance contract to the prejudice of plaintiff.

(2) The Court erred in concluding that the death of insured, although accidental, was not an accidental death within the coverage provided by the insurance contract.

(3) The evidence does not support a conclusion that the pre-existing condition of the insured was a material contributing cause of his death.

(4) The Court erred in concluding that the evidence is insufficient to sustain a finding of death from physical exhaustion.

(5) The Court erred in entering judgment for the defendant and denying plaintiff the right to recover the amount provided under the insurance contract.

ARGUMENT

SPECIFICATIONS OF ERROR # 1 and # 2

Having determined that the death here involved was accidental the trial court necessarily applied an erroneous interpretation and construction upon the insurance contract in order to defeat appellants' claim.

The pertinent portions of the insuring clauses contained in the policy here involved are as follows:

> "INSURING CLAUSE: If at any time during the currency of this Certificate the Assured shall sustain any accidental bodily injury which shall, solely and independently of any other cause within twelve (12) calendar months from the date of the accident causing such bodily injury, occasion the disablement of the Assured as hereinafter defined and a claim be substantiated under this Certificate, the Underwriters will pay to the Assured, his Executors, Administrators or Assigns (or in case such bodily injury shall occasion the death of the Assured, to the Beneficiary or Beneficiaries named herein) according to the schedule of Compensation herein specified within thirty (30) days after satisfactory proof of death or disablement to the Underwriters."

The policy also contains a list of definitions of some of the language used in said insuring clause among which is the following:

> "DEFINITIONS: It is understood and agreed that:
> '2. Bodily Injury Which Shall Occasion Death' includes, in addition to the coverage herein provided, death by exposure to the elements or physical exhaustion or drowning resulting from an accident or mechanical or other failure of anything used as a means of conveyance or transportation."
> (underscoring supplied)

The exclusionary language contained in the policy reads, so far as pertinent, as follows:

> "1. EXCLUSIONS: This Certificate does not cover death, injury or dismemberment:
> "(a)...
> "(b) Directly or indirectly caused or contributed to by . . . disease or natural causes . . ."

The foregoing quoted provisions of this policy fix the insuring liability of appellee. The language used therein is of appellee's choosing, and we believe it to be a generally recognized rule that the construction to be placed upon it should be most favorable to the insured and least favorable to the author of the policy. Watkins v. Federal Life Ins. Co., 54 Ida. 174, 29 P.2d 1007; O'Neil v. New York Life Ins. Co., 65 Ida. 722, 152 P.2d 707; Finley v. Prudential Life & Casualty Ins. Co. (Ore.) 388 P.2d 21.

The trial court in its "Memorandum Opinion" which constitutes the Findings of Fact and Conclusion of Law of the trial court (R.59) stated that "the Court is therefore bound to apply the substantive law of Idaho so far as the same may be ascertained." The Court also stated that "Idaho has regularly construed insuring clauses favorably to the insured." We agree with the foregoing quoted statements of the Court.

We also agree with the following quoted definition and statement regarding "an accident" as contained in the Court's opinion, to-wit:

> "Where the result of an act was not natural and probable and should not reasonably, under all the circumstances, have been foreseen, and is tragically out of proportion to a trivial cause, it is an accident in this jurisdiction within the meaning of this policy. O'Neil v. New York Life Ins. Co., 65 Ida. 722, 152 P.2d 707 (1944). That the act of the decedent was voluntary or deliberate does not change this result. Rauert v. Loyal Protective Ins. Co., 61 Ida. 677, 106 P.2d 1015 (1940)."

The trial court specifically found that "certainly Mr. Grant's death was unforeseen and unexpected" and concluded that under the facts and the Idaho law, the death here involved was "accidental". (R. 6 & 9) Notwithstanding the finding that the death was accidental recovery was denied because the Court concluded that the death was contributed to by the pre-existing diseased condition of the insured.

It is our contention that the Court, in arriving at the conclusion that appellant was not entitled to judgment erred in interpreting both the provisions of the policy and the evidence. We shall first discuss the policy coverage and later, in this brief, discuss the insufficiency of the evidence.

We believe that the more recent decisions of the Appellate Courts throughout our land interpreting risk exclusion clauses similar to the one here involved, are not strictly in accord with earlier decisions. We consider the case of Brooks v. Metropolitan Life Ins. Co. (Cal. 1945) 163 P. 2d 689 to be a recent well considered and influential case. It dealt with an insurance policy containing very similar provisions to ones involved in this case. The policy insured Brooks 'against the results of bodily injuries . . . caused directly and independently of all other causes by violent and accidental means." The policy further provided that it shall not cover "accident, injury, disability, death or any other loss caused wholly or partly, directly or indirectly, by disease or mental infirmity or medical or surgical treatment therefor." The insured was suffering from incurable cancer of long duration and died in a fire which started in his bedroom. The Court in sustaining an order granting a new trial at the request of defendant, stated:

> "...that the presence of preexisting disease or infirmity will not relieve the insurer from liability if the accident is the proximate cause of death; and that recovery may be had even though a diseased or infirm condition appears to actually contribute to cause the death if the accident sets in progress the chain of events leading directly to death, or if it is the prime or moving cause."
>
> "Although it appears that the insured was suffering from an incurable cancer and was under the influence of narcotics given to relieve pain, and that by reason of his weakened and infirm condition he may have been less able than a normal person to withstand the effect of the injuries, there is evidence from which the court could conclude that the proximate cause of his death was burns received in a fire of accidental origin."

In a later California case entitled Stokes v. Police and Fireman's Ins. Ass'n, 243 P.2d 144 the Court had under consideration a policy providing for payment where "death is caused by external, violent and accidental means, independent of all other causes".

The Court, on rehearing, stated:

> "It is our opinion that it is now the settled law of this state since the Brooks decision that a recovery may be had under the provisions of a policy providing for payment where "death is caused by external, violent and accidental means, independent of all other causes' and 'excluding payment where death is caused wholly or in part by disease' if the accident is the proximate cause

> and sets in motion a chain of events leading directly to death, and notwithstanding the fact that a pre-existing disease contributed to the death. Since the court here found as a fact that the accident was the prime and moving cause of death (the pre-existing heart disease only contributing) it cannot be said as a matter of law, in interpreting the provisions of the policy and the evidence, that the death of Stokes was caused in whole or in part by any pre-existing heart disease. As stated above, counsel in the Brooks and Happoldt cases endeavored to avoid liability on the same grounds as appellant here; namely, that death was not caused by the accident, independent of all other causes, but was caused in part by a pre-existing heart disease." (citing cases)

In this connection we call attention to the decision in Graham v. Police & Firemen's Ins. Ass'n. (Wash.), 116 P.2d 352, wherein the court thoroughly considered and discussed the effect of physical infirmity of insured at the time of accident. In this case the policy provided for payment to the beneficiary in the event the insured died "through external, violent and accidental means independent of all other causes." Insured fell and injured himself while undertaking to rescue his daughter from a fire and died approximately 10 days later. He was 59 years of age and had suffered from angina pectoris. The following are excerpts from the court's opinion:

> "It is true that the insured had a disease of the heart which had manifested itself on more than one occasion. That alone, however, will not prevent a recovery on the

policy."

"'The weight of the authorities and the decided trend of modern authority is to the effect that, where disease merely contributes to the death or accident, it is not the proximate cause of the death or injury, nor a contributing cause, within the meaning of the terms of the policy.' Kearney v. Washington National Insurance Co., 184 Wash. 579, 52 P.2d 903, 904.

"In order to recover under a policy such as we have before us, the law does not require that a person must be in perfect health at the time an accident occurs. Pierce v. Pacific Mutual Life Ins. Co., Wash., 109 P.2d 322.

"If it were otherwise, an accident policy such as the one under consideration would be of no value after the insured had contracted some disease regardless of the fact that premiums had been paid for many years. Such cannot be the intent of the contract. It is only necessary for the evidence to disclose that the accident was a direct and proximate cause of the death and that the proximate cause is' *** that which sets in motion a train of events bringing about a result without the intervention of any force operating or working actively from a new and independent source.' Pierce v. Pacific Mut. Life Ins. Co., supra. (citing cases)

"The fact that the physical infirmity of the victim may be a necessary condition to the result does not deprive the injury of its distinction as the sole producing cause. In such case, disease and low vitality do not rise to the dignity of concurring causes, but, in having deprived nature of her normal power of resistance to attack, appear rather as the passive allies of the agencies set in motion by the injury. Driskell v. United States Health & Acc. Ins. Co., 117 Mo. App. 362, 93 S.W. 880, 882."

In Shafer v. American Casualty Company 53 Cal. Reptr. 446, decided September 19, 1966, the Court considered facts very similar to those in the instant case. The policy covered death resulting "directly and independently of all other causes from bodily injury . . and effected solely through accidental means, . . ." coverage for "disease" is expressly excluded.

The insured was involved in an automobile accident as a result of which he sustained a bruise on his arm and shock. At the time of the accident the insured had a serious condition of arteriosclerosis in his coronary arteries and he also had a greatly enlarged heart. He died two days after the accident from a heart attack caused by coronary thrombosis. The court found that the coronary thrombosis which resulted in the death was caused by a concurrence of two things; (1) the shock sustained in the accident and (2) the diseased condition which decedent had at the time of the accident.

The Court found that if the pre-existing condition of arteriosclerosis and an enlarged heart did not exist, the accident alone would not have caused the coronary thrombosis from which the insured died. However, the Court did find that "the accident was the prime or moving cause which resulted in bodily injury which acted upon the pre-existing condition of the deceased, so as to complete a chain of events which led to coronary thrombosis and thus to his death." Judgment for plaintiff

was affirmed.

In this case the Court cites and quotes from many cases, including the leading California cases involving insurance contracts of the kind we are dealing with in this instant case.

The effect of pre-existing bodily infirmities was considered by a Federal Court in Scanlan v. Metropolitan Life Ins. Co. 93 F. 2d 942 (C.C.A. 7th) wherein the insurance policy involved provided:

> "CLAUSE 9. This insurance shall not. . . cover accident, injury, disability, death or any other loss caused wholly or partly, directly or indirectly, by disease or bodily or mental infirmity . . . "

The insured suffered several broken ribs and a large bruise on his left leg as the result of an automobile accident. The bruise was in the area where he was and had been afflicted with varicose veins. His death occurred 15 days after the accident and was caused by the breaking off of part of a blood clot in the leg, which then passed through his veins to the heart and ultimately to his lungs where it became lodged. The trial Court found that "there was only a possibility of a thrombus occurring in the varicose vein in the absence of the injuries sustained." The Court stated that the precise question presented is "Was Scanlon's death caused partially by his bodily infirmity?" In considering the question the Court said:

> "While the bodily infirmity need not be the sole cause of the death to defeat recovery under this policy, it is well settled that the 'cause' as here used, either sole or partial, refers to something different than a disease or affliction rendered more serious by the consequences of the accident.
>
> "One may recover on an accident policy such as here in issue although the insured suffers from bodily infirmities. If the accident brought about conditions from which death resulted, the fact that the insured was ill, aged or infirm, or had bodily or mental infirmities, would not bar recovery provided the accident excited the bodily infirmity into activity and death resulted. If the infirmity alone would not have caused death, it cannot be said to have caused death when the immediate result was occasioned by an infirmity which became active only because of the accident. The infirmity may have made the insured less able to resist, but if the accident caused the condition which in turn affected the weak spot which did not resist as well as a healthy body, the cause is nevertheless the accident, and recovery cannot be avoided or evaded." (Citing cases)

In Life and Casualty Ins. Co. of Tenn. v. Jones 328 S. W. 2nd 118 (Ark. - 1959) the Supreme Court of Arkansas considered a case where the pre-existing bodily infirmities were considerably more severe than in the instant case and two insurance policies were involved. One of the policies contained the provision that it "does not cover death caused directly or indirectly from, or contributed to by bodily or mental infirmities or disease in any form . . ." The second policy was an accident policy only and contained the following quoted provision, to-wit:

> "Benefit for Death by Accidental Means -- If the insured, after the effective date of this policy, sustains drowning or bodily injury effected solely through violent, external and accidental means, and if such drowning or bodily injury is the direct, independent and proximate cause of the death of the insured *** and if such death is not caused or contributed to by disease or infirmity, the company will pay the sum specified ***."
>
> "Exclusions, Reductions and Limitations: This policy does not cover death caused***directly or indirectly from, or contributed to by, bodily or mental infirmities or disease in any form***"

During an altercation insured was clubbed upon the head by a Coca-Cola bottle and died about one-half hour later. An autopsy was performed which listed the cause of death, "Coronary thrombosis and occlusion of the left anterior descending branch of left coronary, with myocardial infarction; severe generalized arteriosclerosis with severe coronary sclerosis; laceration of scalp with hemorrhage; hypertensive cardiac vascular disease, with terminal cardiac failure***."

Appellant claimed error because of the trial Court's refusal to give a requested instruction and direct a verdict for it.

The Court affirmed the judgment, finding no error in the trial Court's refusal to give Appellant's requested instruction and stated:

> "Our exhaustive research reveals the law to be well settled in this state that an insurance company is liable on their policy of accident insurance if death resulted when it did on account

> of an aggravation of a disease by accidental injury, even though death from the disease might have resulted at a later period regardless of the injury, on the theory that if death would not have occurred when it did but for the injury, the accident was the direct, independent and exclusive cause of death at the time." (Citing cases).

In Kievit v. Loyal Protective Life Ins. Co. 34 N.J. 475, 170 A.2d 22 the insured sustained injuries when he was struck by a "two by four" while on the job as a carpenter. Thereafter he developed tremors and became totally disabled. Judgment for defendant was appealed by plaintiff and the Supreme Court reversed the judgment.

The accident policy involved indemnified against loss resulting directly and independently of all other causes from accidental bodily injuries" and included an exclusionary clause which excluded loss "resulting from or contributed to by any disease or ailment."

The trial court found that insured's injury had been contributed to by his pre-existing condition known as Parkinson's disease.

In reversing the trial court, the Supreme Court of New Jersey stated:

> "When members of the public purchase policies of insurance they are entitled to the broad measure of protection necessary to fulfill their reasonable expectations. They should not be subjected to technical encumbrances or to hidden pitfalls and their policies should be construed liberally in their

> favor to the end that coverage is afforded 'to the full extent that any fair interpretation will allow."
>
> "Where particular provisions, if read literally, would largely nullify the insurance, they will be severely restricted so as to enable fair fulfillment of the stated policy objective."

The issue in the case, the court stated was "whether the plaintiff's disability resulted from accidental bodily injuries 'directly and independently of all other causes' and was not 'contributed to by any disease or ailment' within the fair purpose and meaning of the defendant's policy."

The Court quoted Justice Hilton in Wolfangel v. Prudential Ins. Co. of America, 209 Minn. 439, 296 N.W. 576 as follows:

> "'Whenever a person is in any respect below normal in health or bodily resistance, a strict application of the doctrine that the accident must be the sole and independent cause of the death would probably always require a decision for the insurer since it is seldom, from the medical point of view, that one cause is solely responsible for death. Silverstein v. Metropolitan Life Ins. Co., 254 N.Y. 81, 171 N.E. 914; 72 ALR 867. This consideration has persuaded several courts to distinguish between legal and medical causes and recovery is allowed wherever the accident and its effects, acting upon an imperfect state of health, can be said to have been the proximate cause of death.'" (citing cases)

We believe - that a well reasoned discussion of the correct view which should be taken of a physical infirmity as concerns being a contributing or concurring cause of death in an accident case is

presented in the Missouri case of Driksell v. United States Health & Acc. Co. 93 S.W. 880 wherein the court stated:

> "People differ so widely in health, vitality, and ability to resist disease and injury that what may mean death to one man would be comparatively harmless to another, and, therefore, the fact that a given injury may not be generally lethal does not prevent it from becoming so under certain conditions: if under the particular temperament of condition of health of an individual upon whom it is inflicted which injury appears as the active efficient cause that sets in motion agencies that result in death, without the intervention of any other independent force, then it should be regarded as the sole and proximate cause of death. The fact that the physical infirmity of the victim may be a necessary condition to the result does not deprive the injury of its distinction as a sole producing cause. In such a case, disease and low vitality do not rise to the dignity of concurring causes, but, in having deprived nature of her normal power of resistance to attack, appear rather as the passive allies of the agency set in motion by the injury."

Many additional cases supporting a like view could be cited, however we shall conclude this portion of our argument by quoting an applicable general rule which is stated in 56 ALR 2d 816 as follows:

> "There is seemingly general agreement on the proposition that if an unusual happening occurs in conjunction with exertion or exercise on the part of the insured, and this is followed by a

> heart attack, recovery may (assuming causation is established) be had under a policy providing benefits for the results of 'accidental means', whether the unusual happening precipitated the exertion or occurred in the course of the same."

Under this general rule is cited the case of Commercial Travelers Ins. Co. v. Walsh (1955, CA 9th Wash.), 228 F2d 200, 56 ALR 2d 796, in which case the insured was unloading sacked wheat from his truck; one of the sacks, weighing about 140 lbs., started to fall; insured took one step forward, reached out and quickly grabbed the sack with one hand and held onto the building with his other hand holding the sack at a 45^{O} angle until his son could go around the truck and straighten the sack. Insured felt pain in his chest and died the next day as a result of a coronary occlusion. An autopsy showed a pre-existing heart condition. The U. S. Court of Appeals, 9th Circuit in affirming the trial court's decision that his death was caused by accident stated:

> "However, the language used in what appellant contends is the leading Washington decision indicates that where the act of the insured is not 'deliberate', in the sense of being voluntarily done to accomplish a planned purpose, the reaction of the insured to danger should be considered part of the accident causing the coronary occlusion." (Emphasis added)

In the foregoing cited case some discussion is devoted to the effect of a deliberate act on the part of insured. No such deliberate act is involved in the instant case. This insured did not leave a place of shelter and safety to go into the storm exposure. The evidence shows that the storm suddenly developed and that insured was departing from a place where both he and his wife were in imminent danger of drowning and was endeavoring to make their way to relative safety.

SPECIFICATION OF ERROR #3

We sincerely contend that the evidence does not support a conclusion that the pre-existing physical infirmities of the insured were a direct, proximate or a concurring proximate cause of his death. Although the trial court did not find that the pre-existing physical infirmities of the insured constituted a direct or proximate cause of the death, the court did conclude that the evidence preponderated for the position that the death was contributed to by the pre-existing diseased condition of the insured.

It is evident from the "Memorandum Opinion" that the trial court considered that the insured's pre-existing physical infirmities consisted of two conditions, namely - arteriosclerosis and heart trouble.

We agree that the evidence is sufficient to support a finding that the insured had a pre-existing arteriosclerosis condition, but we do not agree that the evidence supp orts a conclusion that he had a "severe arteriosclerosis condition". The record (Tr.78) discloses that Dr. Stier (a witness called by defendants) "assumed" that insured had a severe degree of arteriosclerosis, notwithstanding the fact that the witness never knew the deceased, had never seen him either before or after his death, nor did the witness see or consult any record which described his condition as being "severe". Since arteriosclerosis is a hardening of the arteries and is a condition of the tissues developing gradually over a period of years we believe the witness was entitled to assume that deceased had a condition commensurate with the degree usually present in a person of comparable age, (64 years) and no more.

As concerns the evidence tending to show that insured had at some time experienced some heart trouble the record shows that insured's widow testified that "he had had heart trouble", however she was not asked as concerns how long before his death he had experienced any such trouble. The only other mention of heart trouble was a statement in his application for the insurance policy here involved wherein it was stated that he (insured) had, in about the year 1950, been turned down for insurance because of a suspected heart condition.

There is no evidence disclosing the extent or nature of any heart trouble he experienced during the years or months immediately preceding his death. In this connection we call attention to Mrs. Grant's testimony that "he went out and played golf all the time and went fishing and hunting."

Two doctors testified in this case and were asked a hypothetical question based upon the experiences of deceased during that day. Dr. Pearson unequivocally stated that in his opinion the death of deceased was brought about and caused by the exposure, strain and exertion, and was accidental. Dr. Stier, who was called by defendant, also stated it was his opinion that the exposure, strain and stress was the cause of death. The following are excerpts from Dr. Stier's testimony:

> "Q In your opinion did this stress and strain have anything to do in regard to the fact that this thrombosis was then created as a result of this stress and strain?
> A Ask that Again.
> Q In your opinion was this thrombosis the result of this stress and strain?
> A Yes."

When the doctor was asked if he put any credence or effect on the fact that death followed immediately after the exertion and strain he answered:

"A Certainly I put credence in it.
Q What credence do you put to that?
A The fact that the stress and strain probably was the terminal event that caused the thrombosis and, therefore, caused the death." (Emphasis supplied)

Following some questioning regarding the effect of stress and strain in causing the thrombosis the doctor was asked:

"Q What about the emotional factors, Doctor? What effect does that have upon a person?
A Same effect.
Q What about the two combined together?
A Very definite effect.
Q And together would the combination of these two produce a thormbosis?
A Yes, sir.
Q And this would be sudden?
A Yes, sir.
Q And death would be instantaneous?
A It could be, yes.

* * *

Q You stated that these extreme conditions to which this man was then being subjected to were the contributing factors that caused this thrombosis?
A Yes, sir."

Both doctors gave credence to the time proximity between the unusual exertion on the part of the deceased and his death. This is in keeping with the following quoted excerpt from Levine's third edition, Clinical Heart Disease which was read into this record, to-wit:

> "The most important point in many of these cases is the time relation between the accident and the cardiac abnormality. If the exact status of the patient before the accident is known, it is reasonable to assume that new objective or subjective evidence of disability occurring within minutes, hours or several days is due to the accident."

We believe it to be significant in this case that no witness, either lay or expert, has expressed the belief or opinion that had it not been for the unusual stress and strain exerted by insured on that occasion he would have died on that day. In fact defendant's witness, Dr. Stier was asked "Now, Doctor, in your opinion assuming the weather had been clear and nice and this man hadn't exerted and pulled and tugged on the boat and hadn't done any of these events you had heretofore assumed, do you think that the man would have died with arteriosclerosis on that day?", to which the Dr. finally answered "I have no opinion".

In view of the foregoing mentioned evidence we contend that the Court should have found that the unusual stress and strain exerted by insured, which was accidentally brought on, was the prime and moving cause which acted upon the pre-existing condition of the deceased so as to complete a chain of events which led to the thrombosis and thus to his death. (see Life & Casualty Ins. Co. of Tenn. v. Jones - supra)

SPECIFICATION OF ERROR #4

We cannot agree with the trial court's conclusion that "there s insufficient evidence to sustain a finding of death from physical exhaustion ".

In support of our position regarding the court's conclusion last above referred to we quote from the testimony of Mrs. Grant as she explained the struggle deceased went through in trying to find protection from the storm.

> "Q What did Mr. Grant do at that time, Mrs. Grant?
> A He--after he untied it--he went back and untied it and tried to push it off the rocks. Now in pushing it off, I looked at him and he was out of breath and pale and it looked like he was very tired, and he pushed it out off the rocks to the best of his ability, probably not clear off the rocks because he--well, he then tried to climb--after he had got it back off the rocks some, he climbed into the boat. He pulled himself off into the boat and fell face downward in the bottom of the boat."

SPECIFICATION OF ERROR #5

It is appellants sincere contention that since the trial court expressly found and concluded that the death of insured was in fact "accidental" and not having found that the pre-existing physical

condition was a direct or proximate cause of death. The Court erred in denying appellant a judgment as prayed for. We contend that the applicable rule of law is in substance that even though a disease, bodily infirmity, or predisposing cause exists at the time of the accident, it will not defeat recovery unless it is found to be a direct or proximate cause of death rather than a remote or contributing cause or condition.

In Equitable Life Assur. Soc. of U. S. v. Gratiot 14 P2d 438, the Court stated:

> "A policy of insurance should not, of course, be so strictly construed as to thwart the general object of the insurance. To do so would, in the long run, subserve the purposes neither of insurers nor insured. It can hardly be assumed, in the absence of a contract clearly to the contrary, that the parties to the contract meant to have the double indemnity, or any other provision for cases of accident, apply only in case the insured is in perfect health at the time of the accident."
>
> "The foregoing case as a whole, or at least many of them, all dealing with policies similiar to that in the case at bar, clearly show, we think, that, in solving the problem before us, we cannot overlook the distinction between proximate and remote cause,

> and that if a disease, bodily infirmity, or predisposing cause in fact existed, as claimed, still unless it can be said to be one of the proximate causes instead of only the remote cause or condition, recovery should not, on that account, be denied."

In the instant case the combination of events culminating in and causing the exertion and strain was accidental; the crises brought about by the storm was neither intentional or expected and the reaction of the insured to the danger that existed must be considered as part of the accident causing the acute coronary obstruction suffered by Mr. Grant.

CONCLUSION

The judgment should be reversed and judgment entered for plaintiff in the amount specified in the coverage provision of the policy.

The action should be returned to the trial court with direction to enter judgment for appellant in the amount of the coverage provision of the policy plus a reasonable attorney fee to be fixed by the trial court. It was stipulated (Tr.-64-65) that in the event there is recovery by the plaintiff the Court may fix the amount of attorney's fees to be allowed plaintiff, without the offer of evidence, in accordance with the statutes of the State of Idaho.

The Idaho Statute referred to is I.C. Sec. 41-1839 and the pertinent portion thereof, provides as follows:

> "41-1839. ALLOWANCE OF ATTORNEY FEES IN SUITS AGAINST INSURERS. - (1) Any insurer issuing any policy, certificate or contract of insurance, surety, guaranty or indemnity of any kind or nature whatsoever, which shall fail for a period of thirty (30) days after proof of loss has been furnished as provided in such policy, certificate or contract, to pay to the person entitled thereto the amount justly due under such policy, certificate or contract, shall in any action thereafter brought against the insurer in any court in this state for recovery under the terms of the policy, certificate or contract, pay such further amount as the court shall adjudge reasonable as attorney's fees in such action."

Respectfully submitted,

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